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In the Supreme Court of the United States

OCTOBER TERM, 1976

Case No. 76-954

CUYAHOGA COUNTY BAR ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF OHIO, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MOTION TO AFFIRM

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Defendants-appellees, the Supreme Court of Ohio, C. William O'Neill, Chief Justice, Thomas E. Herbert, Frank D. Celebrezze, William B. Brown, Paul W. Brown, A. William Sweeney and Ralph Locher, Justices of the Supreme Court of Ohio,[1] pursuant to Rule 16 of this Court, respectfully move that the final judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

[1]J. J. P. Corrigan and Leonard J. Stern were defendants in the lower court. After the judgment was rendered they ceased to hold the Office of Justice of the Supreme Court of Ohio. Their successors in office, A. William Sweeney and Ralph Locher, are substituted as parties pursuant to Rule 48(3) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment, entered October 13, 1976, by a District Court of three judges, specially convened pursuant to 28 U.S.C. § 2284, dismissing appellants' complaint, and the complaints in two other actions, attacking the validity of Rules VII and VIII(9) of the Rules for the Government of the Bar of Ohio.

THE RULES INVOLVED

These Rules were adopted by the Supreme Court of Ohio. Rule VII was to become effective October 25, 1975. Rule VIII was to become effective January 1, 1976. The Supreme Court also amended Section (3) of Rule V, effective January 1, 1976, to create the Office of Disciplinary Counsel to assist local bar associations in their investigations of alleged misconduct.

Rule VII is set forth in the Jurisdictional Statement. It provides in substance for the registration of all attorneys in the state and a registration fee payable biennially. The money derived from the registration fees is to be used for the investigation of complaints of alleged misconduct pursuant to Section (3) of Rule V, alleged unauthorized practice of law and such other purposes deemed necessary for the government of the bar.

Section (3) of Rule V, which is referred to in Rule VII, is not set forth in the Jurisdictional Statement. It reads as follows:

> **Referral for investigation.** The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.
>
> There are hereby created the positions of Disciplinary Counsel and Assistant Disciplinary Counsel.

> The Supreme Court shall appoint a Disciplinary Counsel and Assistant Disciplinary Counsel who shall be attorneys at law admitted to practice in this state and who shall not engage in the private practice of law while serving in that capacity.
>
> In the event that a Grievance Committee of a local bar association or the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, each of whose committee members shall consist of attorneys at law admitted to the practice of law by this Court, determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the Grievance Committee of the local bar association or the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.
>
> The Disciplinary Counsel shall appoint, with the approval of the Supreme Court, staff personnel as required to satisfactorily complete investigation of matters referred to him. The Supreme Court shall fix the compensation of the Disciplinary Counsel and Assistant Disciplinary Counsel and personnel employed by the Disciplinary Counsel and provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel.
>
> Funds for the operation of the Disciplinary Counsel's office, including compensation of the Disciplinary Counsel, Assistant Disciplinary Counsel and staff, shall be provided from registration fees collected pursuant to Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.
>
> The Disciplinary Counsel shall be under the supervision of and responsible to the Secretary of the

Board of Commissioners on Grievances and Discipline and shall file annually with the Supreme Court and the Secretary a report of the activities and accomplishments of his office and a report of the expenses of operation of his office.

Rule VIII creates the Board of Commissioners of the Unauthorized Practice of Law and provides the procedure for processing complaints alleging such unauthorized practice. Rule VIII(9) provides that the expenses incurred by local bar associations in handling such complaints shall be provided from registration fees.

The Supreme Court, on December 3, 1975, gave notice that it would take no action to implement Rules VII and VIII until the termination of the litigation then pending in the District Court.

PROCEEDINGS BELOW

Appellants instituted this action in the United States District Court for the Northern District of Ohio. That Court found that venue did not lie in that district and transferred the case to the Southern District where two other actions, which also challenged the validity of Rule VII, were pending. A copy of the Memorandum and Order is set forth as Appendix C, at A-13, in the Jurisdictional Statement.

All of the actions alleged similar grounds for relief. The plaintiffs claimed that the registration fee denied attorneys procedural and substantive due process rights, equal protection of the laws and their right to associate with other attorneys. They also claimed that the registration fee was invalid under state law.

The District Court reviewed each of the federal claims and found them without merit. It refused to take jurisdiction over the pendant state law claim.

ARGUMENT

The Questions Presented In The Jurisdictional Statement Are Unsubstantial.

Appellees respectfully submit that the decision of the District Court is so clearly correct and the questions raised in the Jurisdictional Statement are so unsubstantial that no further argument is warranted.

The District Court found that the rules did not violate any substantive due process rights of the appellants. It held that appellants could not succeed on this claim unless they could show that there was no rational connection between Rule VII and the interest of the Supreme Court of Ohio in regulating the bar. *Kelley* v. *Johnson*, 425 U.S. 238 (1976); *North Dakota St. Bd. of Pharmacy* v. *Snider's Drug Store*, 414 U.S. 156, 164-167 (1973), *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-732 (1963).

The District Court found that appellants had failed to make such a showing. It stated that the Supreme Court of Ohio had the duty to limit the practice of law to those professionally and morally qualified and that the registration fee was intended to generate a fund to finance the accomplishment of that end. It, therefore, found that there was a rational relationship between the fee and the Supreme Court's duty of regulating the bar. (Jurisdictional Statement at A-7.)

Appellees submit that this finding is clearly correct. The American Bar Association created a special committee to study and evaluate all aspects of professional discipline. The committee in its report, *Problems and Recommendations in Disciplinary Enforcement* (1970), found that the existing procedures were inadequate and in need of immediate reform.

The most significant problem was inadequate financing. If there are no funds to hire a professional staff, the system must depend upon volunteer attorneys. Such attorneys, no matter how dedicated, cannot devote the same time and attention to the complaints of misconduct as a full-time employee. In addition an attorney may not have the necessary training or experience to investigate complicated matters.

Appellees, therefore, submit a professional full-time staff, financed by a registration fee, to investigate complaints of misconduct is a reasonable means, if it is not absolutely necessary, to insure that attorneys conform to high professional standards.

Appellants do not dispute either the criterion or the finding of the District Court. They argue in their Jurisdictional Statement that there is no provision in Rule V for any portion of the money derived from the registration fees to be used to fund the Office of the Disciplinary Counsel; that the only purpose for which such money is to be used is to investigate allegations of unauthorized practice of law, which they characterize as a "non-judicial function;" that the registration fee is in violation of the State Constitution; and that non-payment of the fee will subject them to disciplinary proceedings.

Rule V(3) which is referred to in Rule VII and which is set forth in this Motion at Pages 2-3, states that funds for the operation of the Office of the Disciplinary Counsel and the compensation of his staff are provided from registration fees.

Appellants do not explain the reasoning upon which they base their contention that the Supreme Court of Ohio has no authority to prohibit the unauthorized practice of law. Neither do they cite any authority to support the contention. They merely assert that it is a "non-judicial function."

This contention was not made in District Court. That court, therefore, had no occasion to rule on it. The Supreme Court of Ohio, however, has held that it has the inherent authority to prohibit the unauthorized practice of law. *In re Unauthorized Practice of Law*, 175 Ohio St. 149 (1963). Appellees submit that this holding is clearly correct. A state Supreme Court has the authority and the duty to protect the public from being induced to rely upon legal advice and services furnished by persons not qualified to practice law.

The District Court did not exercise pendant jurisdiction over appellants' state law claims. Since appellants' federal claims were dismissed prior to trial, the decision of the District Court is clearly justified if not required by *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-726 (1966).

In any event the state law claim has no merit. The portions of the Ohio Constitution set forth in the Jurisdictional Statement shows that the Supreme Court has jurisdiction over all matters relating to the practice of law [Sec. 2(B)(1)(g), Art. IV] and the authority to prescribe rules governing the practice [Sec. 5(B), Art. IV].

In addition even before the adoption of the above constitutional provisions, the Supreme Court had the inherent authority to regulate the practice of law and to prohibit the unauthorized practice of law. *In re Nevius*, 174 Ohio St. 560, 565 (1963); *In re Unauthorized Practice of Law, supra*, 175 Ohio St. 149.

Even if there were some merit to appellants' state law claims, it would not present a substantial federal claim. The due process clause leaves the states free to distribute the powers of government as they deem best. *Hughes* v. *Superior Ct. of California*, 339 U.S. 460, 467 (1950); *Int'l.*

Brotherhood of Teamsters v. *Automobile Drivers Un.*, 339 U.S. 470, 479 (1950).

In addition the claim is foreclosed by the decision in *In re Reed*, 396 U.S. 274 (1970). The same claim was raised and rejected by the state Supreme Court. *In re Members of the Bar of the Supreme Court of Delaware*, 257 A.2d 382 (S.Ct. Del. 1969). In his appeal to this Court the appellant in that case claimed that a court rule which required attorneys to make annual contributions deprived him of his property in violation of the due process clause. *In re Reed*, 38 L.W. 3224 (1970). This Court dismissed the appeal on the ground that it did not present a substantial constitutional question.

Appellants also claim that subjecting them to disciplinary proceedings for non-payment of the fee deprives them of due process. Their argument apparently is that once an attorney is licensed to practice law in a state his right to continue to practice law cannot be made subject to the payment of a fee. This claim is foreclosed by the decisions of this Court in *Lathrop* v. *Donahue*, 367 U.S. 820 (1961); and *In re Reed*, *supra*, 396 U.S. 274.

Appellants in their proposed Second Amended Complaint state that prior to the adoption of Rule VII the Supreme Court of Ohio publicized its intention to adopt the Rule and any determination by the Supreme Court that it in fact had no power or authority to adopt the Rule would constitute a public embarrassment to the court. This is apparently the only basis for their claim that the Supreme Court of Ohio is not a fair and impartial tribunal. They concede that the imposition of a registration fee is clearly within the authority of the Supreme Court under the State Constitution. (Jurisdictional Statement at 18.) They also state that they are not claiming that the Supreme Court

is not a fair and impartial tribunal for the determination of whether an attorney should be disciplined. (*Ibid.* at 19-20.)

Appellees submit that this claim has no merit. This Court adopted the Federal Rules of Civil Procedure. This did not prevent the Court from considering the validity of these rules. *Mississippi Pub. Corp.* v. *Murphree*, 326 U.S. 438, 444 (1946).

The Supreme Court of Ohio, in spite of what appellants suggest would be "a public embarrassment" has found invalid one of the Rules of Appellate Procedure which it adopted. *State* v. *Hughes*, 41 Ohio St.2d 208 (1975).

The members of the Supreme Court of Ohio have no pecuniary interest in the registration fees. That money will be used to provide needed improvements in the existing procedure for professional discipline and to discover and prevent the unauthorized practice of law.

The filing of these actions is not sufficient to constitute a statement of personal abuse against the Supreme Court of Ohio or any of its members. Appellees respectfully submit that there is, therefore, no basis to assume that the state judicial system could not provide a fair and impartial tribunal. *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Cf. *Kugler* v. *Helfant*, 421 U.S. 117 (1975).

Appellees submit that the refusal to permit appellants to file a second amended complaint was a proper exercise of discretion. As the District Court pointed out, the motion for leave to file such a complaint was not timely filed. In addition the matters which appellants sought to raise by their amendment were considered and determined in that court's original opinion and order. (Jurisdictional Statement at A-12.)

CONCLUSION

Appellees respectfully submit that the judgment of the District Court is clearly correct and that the questions raised by this appeal are so unsubstantial as not to need further argument. Appellees respectfully move this Court to affirm the judgment of the District Court.

Respectfully submitted,

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